## Law Offices GOLDSTEIN & WEINSTEIN

### 888 GRAND CONCOURSE BRONX, NEW YORK 10451

DAVID J. GOLDSTEIN BARRY A. WEINSTEIN 9147 TEL: (718) 665-9000 FAX: (718) 665-

August 1, 2008

#### BY HAND AND ECF FILING

Honorable William H. Pauley, III United States District Court Southern District of New York 500 Pearl Street New York, New York 10007

Re:

United States v. Pedro Luis Rodriguez Docket No. 07 Cr. 783-02 (WHP)

Dear Judge Pauley:

I write this letter to set forth the defendant's objections to the Pre-sentence report (hereinafter "PSR"), and to provide additional information and documentation concerning the defendant and his background which were not included in the report. For all of the reasons set forth hereinafter, we respectfully suggest that the defendant should be afforded a reduction for minor role, which would reduce his Base Offense Level from 30 to 28, and his Adjusted Offense Level to 21, rather then the level of 27 contained in the PSR, and that a non-guideline sentence is appropriate in this case.<sup>1</sup>

With the decision of the United States Supreme Court invalidating the Sentencing Guidelines as a mandatory sentencing scheme, as well as the decision of the Second Circuit in *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), this Court

The defendant entered a plea without the benefit of a plea agreement. The "Pimentel" letter submitted by Government contains a Base Offense Level of 32, predicated upon the Government's estimation of relevant conduct of more than 5 kilograms of cocaine, which has been adopted by Probation. We believe, however, that the offense conduct, including all relevant conduct, involved more than 3.5 kilograms, but less than 5 kilograms.

has the discretion to impose any "reasonable" sentence. The Government agrees that the defendant qualifies for the benefit of the "safety valve." Consequently, there is no mandatory minimum sentence required, and the only limitation upon this power is that the sentence must be reasonable. The *Booker/Fanfan*, *Crosby* decisions refer the court to Title 18 U.S.C. § 3553 (a), for a list of factors to be considered in making that determination.

#### A. The defendant's role in the offense and relevant conduct

The defendant was contacted by co-defendant, Maximo Gomez, and asked whether or not he could obtain 3 kilograms of cocaine for Gomez' customer. The defendant, who did not have his own drugs, contacted Marino Reyes, an associate of the defendant's uncle, to try to obtain the cocaine.

The defendant does not now, and has never disputed that he arranged for Reyes to provide 3 kilograms of cocaine to Gomez' customer, who turned out to be a confidential informant working for the Drug Enforcement Administration (hereinafter "DEA"). It is equally clear however, that the drugs did not belong to the defendant, and that he was never a supplier of any drugs in the literal sense. His role in this transaction, as well as in the other transactions he acknowledged during the numerous proffer sessions in which he participated, was limited to finding someone else who could provide the drugs for which he would be paid a relatively small amount of money.

The defendant admittedly bears the burden of establishing, by a preponderance of the evidence, that he is entitled to a role reduction. <u>United States v. Shonubi</u>, 998 F.2d 84, 90 (2d Cir. 1993). The determination is fact-specific and depends upon the nature of the defendant's relationship to other participants, the importance of his actions to the success of the venture and his awareness of the nature and scope of the criminal enterprise. <u>United States v. Gomez</u>, 103 F.3d 249, 254-55 (2d Cir. 1997). The defendant must show not only that he is less culpable than the participants in the charged conspiracy, but also that he is less culpable than the average participant in a narcotics conspiracy. <u>United States v. Ajmal</u>, 67 F.3d 12, 18 (2d Cir. 1995); <u>United States v. Lopez</u>, 937 F.2d 716, 728 (1991).

Applying these standards to the facts presented here, we believe that the evidence establishes that the defendant was both less culpable than the participants in this case and also less culpable than the average participant in a narcotics conspiracy. Consequently, we suggest that he should be afforded a two-point role reduction.

We also believe that the offense quantity should be less than the 5 kilograms which is the amount calculated in the PSR (¶ "27."). We believe that the Probation Department, as more fully described in paragraph "23." of the PSR, is relying solely upon the defendant's statements during his proffer sessions to calculate the quantity. As indicated in paragraph "25." of the PSR, and based upon my presence at a number of those sessions, I believe that the defendant admitted only three other transactions in which he participated, one for one kilogram of cocaine, and two other much smaller transactions, which when added to the three kilos in this case, aggregates less than 5 kilograms.

### B. The defendant's background

The defendant, Jose Rodriguez, is currently 24 years of age, and a citizen of the Dominican Republic. He has no criminal record either in this country, or his native country. Prior to his arrest, he was living with Lillian Acosta and a family member in the Bronx. Lillian is the person who retained counsel in this case, and while the defendant expressed uncertainty about the prospects for their relationship in light of his deportation (PSR, ¶ "46."), she has remained supportive up to the date of the writing of this letter. She calls me on a weekly basis to inquire about the status and prospects of his case.

The defendant is the father of two young children. His mother currently maintains custody of his son, Raylin, age three. The defendant provided money to his mother to help care for his son from the jobs he was doing prior to his arrest. He was also responsible for providing money to help support his son, Junior, who lives with his mother and her parents in the Dominican Republic.

The defendant came to this country to attempt to make a better life for himself and to help provide for his two young sons. It was never his intention to become involved in any illegal activity. As reflected in the PSR, Mr. Rodriguez began to work immediately at a restaurant owned by his uncle Ramon as soon as he arrived

here. He continued to work at the restaurant until the restaurant closed.

He then attempted to make ends meet by working at odd jobs, however, the work was sporadic and extremely low paying. Unfortunately, he did not have enough money to live, let alone send money back to the Dominican Republic to help support his children.

His situation was worsened by the health problems that his mother was experiencing. Prior to that time, she was able to care for herself and the defendant's 3-year-old son. The defendant's father is a farm worker, who does not earn sufficient money to support the family.

As indicated in the documents annexed hereto as "Exhibit A," the defendant's mother currently suffers from a myriad of health problems. She is afflicted with a severe case of hypertension, as well as other illnesses which require a substantial amount of medication. I have provided the information concerning the medicines she takes to attempt to determine the exact nature of her medical problems to both a certified Spanish Interpreter, as well as a pharmacist, who is Dominican. Unfortunately, neither has been able to provide me with the nature of the other medical problems she suffers from.

### C. Sentencing Recommendation

It appears clear that a sentence below the guideline range, which is ultimately calculated, is appropriate here. A non-guideline sentence is justified by the defendant's unblemished record, his family situation, and his mother's health problems.

A non-guideline sentence is also justified by the fact that the defendant will obviously be deported after the completion of whatever prison term is imposed by this court. While deportation of itself does not legally require the service of an additional prison term, it is an integral part of the punishment. Initially, after completing the service of his sentence in this case, it takes many months, during which the defendant will be incarcerated in county facilities, before he is actually deported. This is additional time in jail which will be not be credited to the prison term imposed by this court.

Further, deportation also negates the necessity of punishment for the purpose of individual deterrence. Obviously, when the defendant is deported he will no longer be at liberty in this country to commit any future crimes, assuming he had the intention of doing so. We also respectfully suggest that there is little difference to society, in terms of general deterrence, if the defendant receives a guideline sentence and is then deported, than if he receives a lesser sentence prior to deportation.

Additionally, we do not believe that a guideline sentence will have a substantially greater effect in the State of New York to deter individuals here from engaging in the type of conduct at issue here than a lesser sentence would.

Thank you for your consideration.

Respectfully yours

David J Goldstein

cc: AUSA Chi T. Steve Kwok by facsimile w/encs.

USPO Colleen Tyler by facsimile w/encs.

## **EXHIBIT A**

Document 38-2

Filed 08/04/2008

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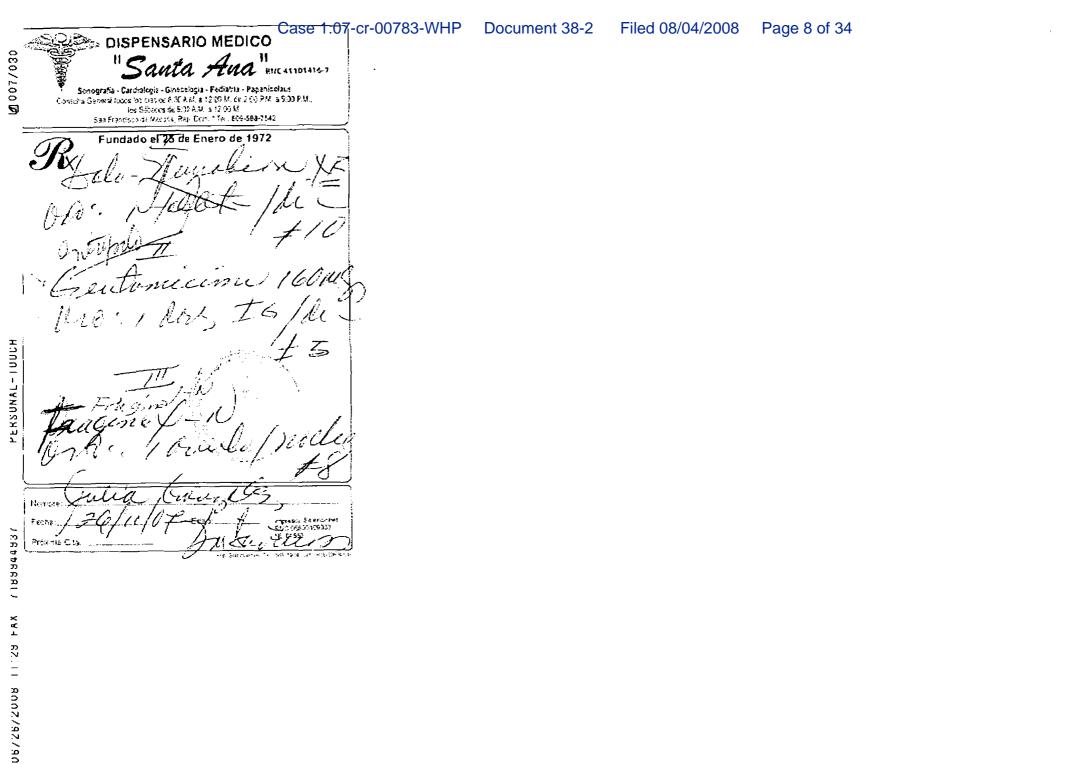
### HOSPITAL REGIONAL UNIVERSITARIO SAN VICENTE DE PAUL

Laboratorio Clínico Tel.: 809-588-2327 San Francisco de Macorís, R.D.



### **DEPARTAMENTO DE PARASITOLOGIA**

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### DR. EMENEGILDO SANCHEZ E.

Neuro Cirujano
Post-grado Hospital José María Cabrat y Báez (PUCMM)

CENTRO MEDICO SIGLO XXI Ci La Cruz Esq. Duarte San Fco. de Macoris, Rep. Dom. Tel: 809-588-1717ext, 245 Cel.: 829-717-2285 809-653-2009

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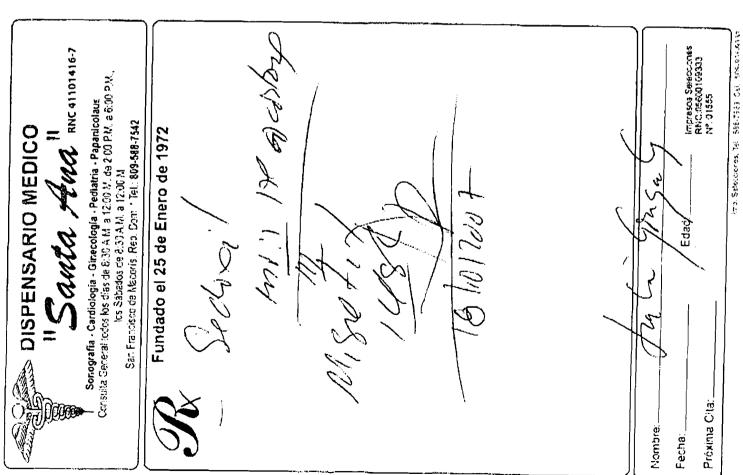
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#### MATERNO INFANTIL DEL NORDESTE CALLE SALCEDO ESQ. PADRE BREA S.F.M. Teléf.: 809-588-7080/ 138 Fax: 809-7251505

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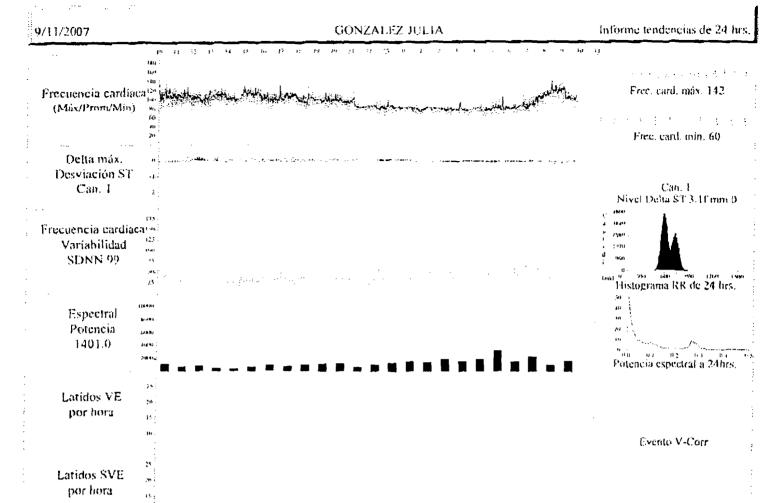
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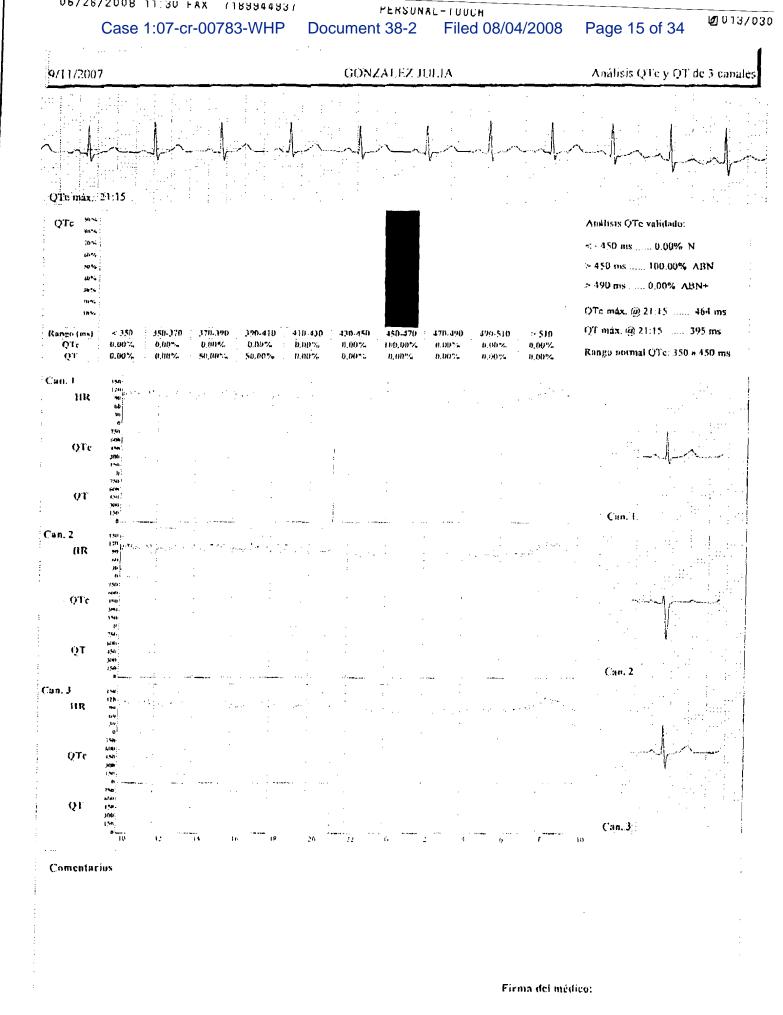
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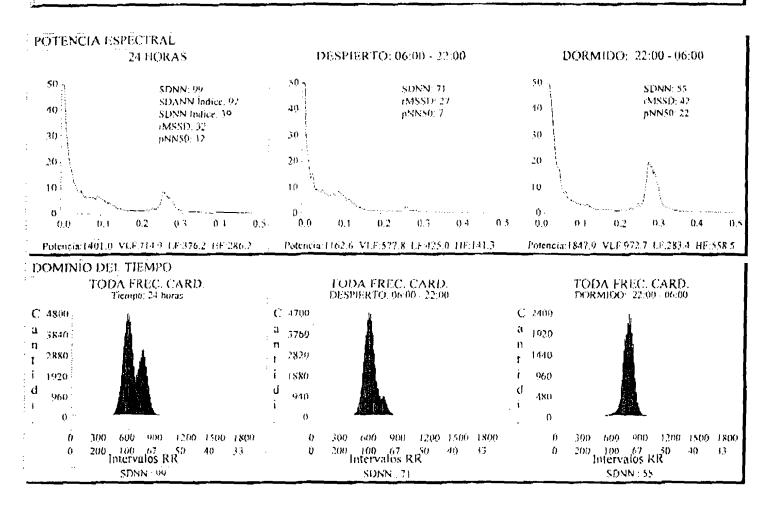
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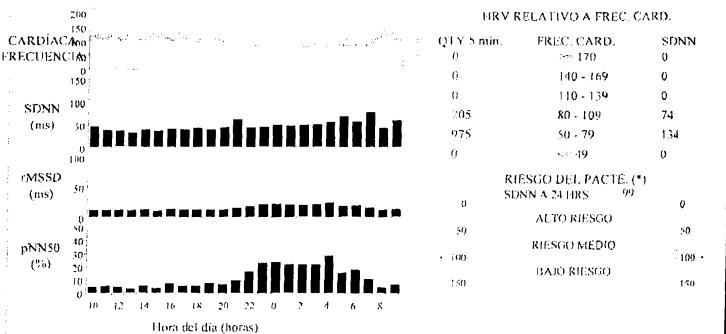
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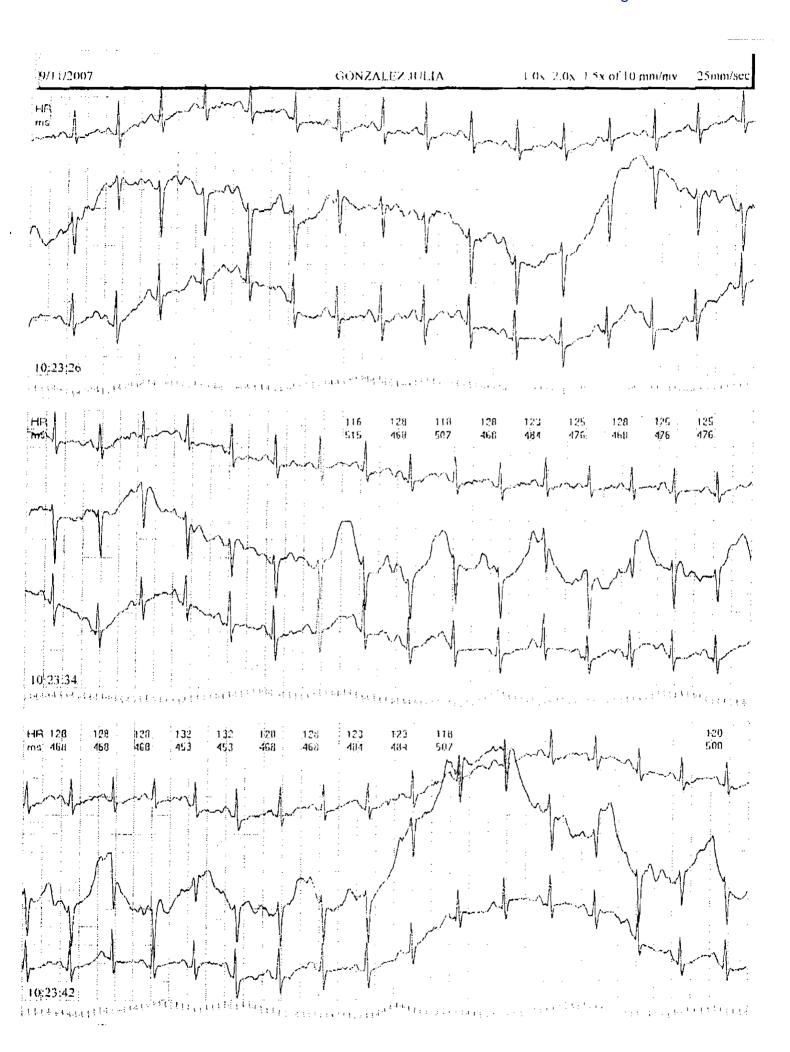
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HOSPITAL REGIONAL SAN VICENTE DE PAUL

CALLE CRISTINO ZENO ESO. LUPERON, SAN FCO DE MACORIS

TEL: 809-588-2327

Datos Paciente

Nombre

**JULIA FALCONERYS** 

, GONZALEZ

Sexo

Fecha Nacimiento

Mujer

Análisis realizado por

EXT.

Otros datos

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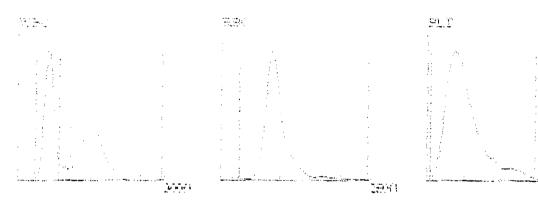
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